No. 2410

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

BENSON LUMBER COMPANY, a corporation,
Plaintiff in Error,

vs.

H. C. McCANN, by Jesse F. McCann, his guardian ad litem,
Defendant in Error.

Supplemental Brief for Defendant in Error

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Supplemental Brief for Defendant in Error

I.

In the brief to which this is by the gracious permission of the court permitted to be a supplement, we adverted to what we ventured to characterize as the primary sense in which the term assumption of risk is used when the master is not charged with negligence, as distinguished from the secondary sense in which the term is used when the negligence of the master supervenes. This distinction is most clearly stated by the Supreme Court in the very recent case of *Seaboard Air Line Railway* vs. *Horton* (April 27, 1914) 233 U. S., 492, U. S. Adv. Opinions, 1913, 635, 640, as follows:

> "Such dangers as are normally and necessarily incident to the occupation are presumably taken into the account in fixing the rate of wages. And a workman of mature years is taken to assume risks of this sort,

> whether he is actually aware of them or not. But risks of another sort, not naturally incident to the occupation, may arise out of the failure of the employer to exercise due care with respect to providing a safe place of work and suitable and safe appliances for the work. These the employee is not treated as assuming until he becomes aware of the defect or disrepair and of the risk arising from it, unless defect and risk alike are so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated them. These distinctions have been recognized and applied in numerous decisions of this court." Citing 191 U. S., 64, 68; 220 U. S., 590, 596; 228 U. S., 319, 321; 232 U. S., 94, 102, and cases in them cited.

We have submitted with sufficient fullness that because the plaintiff received his hurt from a proximate cause negligently created by defendant outside of any function of this lumber mill, the doctrine of contractual assumption of risk in the primary sense as incident to the employment has no application whatever.

In this connection we note the suggestion made in argument that the X board had a utility to prevent the clothing of employees working about the dog-roller from being caught by it. The sole foundation for this is what was said in the testimony of plaintiff (Tr., p. 159) to the effect that "I was informed afterwards that it was there for the purpose of avoiding getting your clothes caught in the teeth of that roller when you got up on the platform, but I never knew it at the time." This "information" was evidently by way of excuse made to him after his injury for the presence of this plank. How lame an excuse, is apparent when it is remembered that the dog-roller rose and was exposed *above and in immediate proximity to the X board*, and that the presence of that *in its combination*

with the roller, is what made the chief element of danger from any clothing, whether from coat or shirt sleeve to shoe, being caught by the roller. This is demonstrated by what actually occurred.

We submit that there is no ground, as a matter of law, under the evidence, of any justification for this X board, by any possible function which it served in the work of the mill. (Kilty, Tr., p. 200; Diller, Tr., p. 175; Coffin, Tr., p. 225.) Therefore, because of this and the concurring negligence of defendant, there was no assumption of the risk in the primary sense of the term.

II.

We have submitted in the former brief that by the amendment to Section 1970 of the Civil Code, the doctrine of assumption of the risk of injury in the secondary sense in case, where the risk arises from the master's negligence, is confined to *actual* as distinguished from *imputed* or *constructive* understanding, comprehension and appreciation of the danger incident to the use of defective machinery, ways, appliances or structures.

We do not mean to say that such *actual* understanding, comprehension and appreciation may not in exceptional and extreme cases appear to an Appellate Court to be so clear and positive upon the whole evidence, notwithstanding even the denial of the plaintiff that it will hold that the court below and not the jury should have decided that question of fact. This is what we understand is meant by the phrase that in such a case it becomes a question of law. But what we do mean to insist upon, is that this statute does away, both for court and jury, with such inquiries as to what in respect of danger from the negligent act of the master the injured employee *ought* or *should* have understood, comprehended and appreciated; and it

limits the inquiry to what he did in *fact* understand, comprehend and appreciate.

We submit that when the whole evidence in this case is read and all the circumstances considered, the conviction will ensue that this youth had not the first suspicion of the particular danger which caused his hurt. That when it is argued for the defendant that he *ought* to have understood, comprehended and appreciated this particular danger; or that by the exercise of reasonable care he *would* have understood, comprehended and appreciated it, it is argued that the statute be disregarded. We submit that the elaborate amendment of March 6, 1907, must have some purpose other than to simply declare the law as it theretofore existed on this subject. And we submit that one plain purpose of the amendment was to do away with all speculation as to whether the injured employee should, or ought to have understood, comprehended and appreciated the danger; and that the amendment brings the inquiry down to the naked question of fact in this case, whether indeed and in truth "such employee fully understood, comprehended and appreciated the danger" lurking in the relation between the X plank and dog-roller, which he encountered in obeying the order and requirement to mount the "push table" in the manner in which he did mount it.

We submit that when, as applied to this case, the statute makes void any implied agreement to *waive* the benefit of the amended section or any part thereof, it in effect commands that the secondary doctrine of implied assumption shall be limited to cases of *actual*, and prohibits it from being extended to mere *constructive* or *imputed* understanding, comprehension and appreciation of the danger from such risk.

We submit also, that that statute in its declaration that

"this section shall not be construed to deprive any employee or his legal representatives of any right or remedy to which he is now entitled under the laws of this state," leaves to this minor plaintiff in all courts the rights and remedies guaranteed to him under the settled law of this state, as reaffirmed in the numerous decisions cited in the brief to which this is a supplement at pages 50-51, and declared by the District Court in its instruction No. VIII (Tr., p. 270).

That is to say, before this youth can be held as a matter of law to have assumed the risk of the defendant's negligence, it must appear that the master first gave him such full and complete instruction as to enable him to comprehend the dangers to be encountered, without which it was a "breach of duty for the master to expose such servant, *even with his own consent to such danger.*"

(See the cases cited pp. 50-51 of our original brief.)

That statute, we submit, has given legislative sanction to the modern tendency to regard as for the jury the question of assumption in this secondary sense of the risk arising from the master's negligence. More specifically, the statute in requiring that the acquiescence in, or condonation of, the master's negligence and waiver of his responsibility by the employee, shall be predicated, only when it appears as a fact that he "fully understood, comprehended and appreciated the dangers" consequent thereon, renders the determination of this fact peculiarly a question for a jury. We have it upon authority that modern decisions have receded both in England and the United States, more and more from the doctrine of this secondary assumption of risk enforced by the court, as a matter of law, in the "inhuman" form in which it was expounded by Lord Bramwell in *Dynen* vs. *Leach* (1857) 26 L. J. Exch. N. S., 221.

See Labatt, Master & Servant, 2nd Ed., Sec. 960.

Schlemmer vs. *Buffalo R. & P. R. Co.*, 205 U. S. 1, 11-12, per Holmes, J.

In *Rase* vs. *Minneapolis, St. P. etc., R. Co.* (Minn., 1909), 170 Minn., 260, 120 N. W., 360, 21 L. R. A. (N. S.), 138, 152, it is said:

> "The statement is currently made that the American cases, taken as a whole, are inclined to regard the questions involved in assumption of risk—knowledge of dangerous conditions, appreciation of risk, and acquiescence therein—as for the jury. In connection with this opinion many hundreds of cases have been examined and that tendency verified."

That case contains an elaborate review of the English and American course of decision upon the subject of submission to the jury in such cases of the question of plaintiff's assumption of the risk caused by the employer's negligence. In the course of the opinion, it is said (21 L. R. A. (N. S.), p. 152) referring to *Washington & G. R. Co.* vs. *McDade*, 135 U. S., 554, 572:

> "After stating the current formula as to contributory negligence and assumption of risk, Lamar, J., said, quoting from *Jones* vs. *East Tennessee etc., R. Co.*, 128 U. S., 443, 445-6; 'We see no reason, so long as the jury system is the law of the land and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as these as well as others.' "

In the McDade case, there was also quoted (135 U. S., 572) from the Jones case (128 U. S., p. 446) the language, to-wit:

> "...a due regard for the respective functions of the court and the jury would seem to demand that those questions should have been submitted to the jury."

See also on the question whether the learned District Court properly submitted this case to the jury;

Texas & P. R. Co. vs. *Harvey*, 228 U. S., 319, in which a statute of Texas which qualified the rule of assumed risk caused by the master's negligence was considered. The case has a decided bearing upon the effect of the amendment of Civil Code, Section 1970, upon the secondary doctrine of assumed risk in this state.

And since by this statute under the defense of confession and avoidance, the very point of inquiry is *as to the fact* whether the plaintiff "fully understood, comprehended and appreciated the risk and *thereafter* consented to continue in the work, there is entirely appropriate to be applied here what, the court said in *Texas & P. R. Co.* vs. *Harvey*, *supra* (228 U. S., p. 325):

> "The appellate court is not a jury for the trial of a case nor do we have the powers of a court to grant a new trial, which, in the Federal practice, is a matter vesting in the sound discretion of the trial court."

As was said in the oral argument by counsel for the plaintiff in error, a motion for new trial was made before the District Court and denied. The case has consequently passed that ordeal.

The question before this tribunal therefore comes to this. Did the alleged assumption of the risk which was caused by defendants' negligence become under all the evidence and circumstances so imperatively a question of law that the appellate court will now say that the court below erred in that it did not take the case from the jury, by directing a verdict for the defendant and in not setting aside the verdict for plaintiff?

> *Texas & P. R. Co.* vs. *Harvey*, *supra*, 228 U. S., 324, 325.

In *Chicago Screw Co.* vs. *Weiss*, 203 Ill., 536, 68 N. E., 54, 55, the rule is laid down in terms substantially identical with that declared in *Gardner* vs. *Michigan C. R. Co.*, 150 U. S., 349, 361, cited on page 53 of our original brief as follows:

> "Whether a servant had assumed the danger which he encountered is ordinarily a question of fact and only becomes a question of law when but one conclusion can be drawn from the evidence by all reasonable minds."

We submit that in this case the conclusion of the court below in the submission of the case and in the review of that submission on motion for a new trial should have its proper consideration.

As bearing upon the contention upon which the writ of error in this case is principally rested, to-wit, that the danger in encountering which plaintiff was injured, was so obvious that it was error for the District Court not to have held, as a matter of law, that plaintiff assumed the risk and that the action is barred, we seek to summarize the principal elements of the case as developed in the evidence, with a citation from the vast body of precedents of a few deemed apposite to one or more such elements, as follows:

1. The master ordered and required the plaintiff, in addition to and beyond the work for which he was employed and for which his wage was fixed, which work was in itself exceedingly strenuous even for a mature workman, to perform the extraordinary service of mounting the push-table to clear the jams of lumber.

2. Plaintiff was a minor aged 17 year and inexperienced.

3. This extraordinary work was of an extra hazardous nature and was required to be performed while the

mill was in operation, and in order to prevent interruption of its operation by relieving and supplementing the defective working of its machinery, and under conditions of extreme haste, noise and confusion.

4. The defendant furnished no proper appliances for mounting the push-table.

5. The defendant gave to plaintiff no instruction how to mount or warning respecting any danger to be encountered in mounting the push-table to perform such extraordinary work.

6. The proximate cause of the injury was the useless X board which combined with the dog-roller to create a latent danger outside of any function of the mill or any work for which the plaintiff was employed.

7. Nothing had occurred to direct plaintiff's attention to this particular danger and he did not at all understand, comprehend or appreciate the danger extraneous to any function of the mill, caused by this X board.

In view of the concurrence of all these elements, it is submitted that the District Court properly submitted the question of assumption of risk to the jury; that it properly exercised its discretion to deny the motion for a new trial; and that in the exercise by this court of its appellate powers it is open to it to say, in the language of the Supreme Court of the United States in the case of *Texas & P. R. Co.* vs. *Harvey*, *supra*, 228 U. S., 319, 325:

> "Under all the circumstances, as we have related them, we cannot see, as an appellate court, that the court was wrong in leaving the question to the jury under the fair and full instructions given."

As applying to one or more of the concurring elements above stated which tend to make the issue of assumption of risk in the secondary sense, owing to the conceded neg-

ligence of defendant, a matter for submission to the jury, rather than a matter of law for the court, we cite the following authorities; but we premise the remark that all such citations are subject to consideration of the amendment to section 1970 of the Civil Code, which, we have submitted, excludes any doctrine that the full understanding, comprehension and appreciation of the incident dangers, as required by the statute, is to be established by construction or imputation rather than by the determination of the fact itself.

The following cases, we submit, apply to one or more of the elements which inhere in this case, as above stated:

Union P. R. Co. vs. *Fort,* 17 Wall., 553, 557-8;

Smith vs. *Cook*, 164 Fed., 628, 630-1, affirmed in 187 Fed., 538, 540;

Gila Valley G. N. Co. vs. *Hall*, 232 U. S., 94.

"As in all cases of extraordinary risks, the question of whether the servant appreciated the risks of new duties, is primarily for the jury."

Labatt Master & Servant, 2nd Ed., Sec. 1386, p 3990, citing *Foley* vs. *Cal. Horseshoe Co.*, 115 Cal., 184, 194.

See also *Daubert* vs. *Western Meat Co.*, 135 Cal., 144, 147-149;

Mansfield vs. *Eagle Box etc., Co.*, 136 Cal., 622, 625-6;

Merrifeld vs. *Maryland Mfg. Co.*, 143 Cal., 54;

Jensen vs. *Will Finck Co.*, 150 Cal., 398, 411;

Quinn vs. *Electric Laundry Co.*, 155 Cal., 500, 507;

Schellin vs. *North Alaska Salmon Co.*, 167 Cal., 103;

Petersen vs. *Cal. C. Mills Co.*, 20 Cal. App., 751, 757, 758, 764;

Wells & French Co. vs. *Capaczynski*, 218 Ill., 149, 75 N. E., 751.

In *McMahon* vs. *McHale* (Mass.), 54 N. E., 854, 855-6, it was said:

> "As neither of the men injured was concerned with the derrick except that it was so near the place where they were at work that it might injure them if it should fall, we think it cannot be said as a matter of law, that they were negligent in working there, or that they had accepted the risk of injury."

This has a bearing upon the unnecessary X board in this case.

Shannon vs. *Shaw*, 201 Mass., 303, 87 N. E., 748;
Tuckett vs. *American Steam & Hand Laundry*, 30 Utah, 273, 84 Pac., 500;
Noden vs. *Verlender Bros., Inc.*, 211 Pa. St., 135, 3 A. & E. Ann Cas, 367 and note.
Dallemand vs. *Saalfeldt* (Illinois), 175 Ill., 310, 51 N. E., 645.

In *St. Louis Cordage Co.* vs. *Miller*, 126 Fed., 495, much relied on by defendant, but plainly distinguishable from the case before the court, it was said (p. 509):

> "Of course, the question whether or not a servant has willingly assumed a risk of the service is, like all questions of fact, for the jury when the evidence is conflicting or when the deductions from it are doubtful, and as this is usually the case in the trial of this issue, as in the trial of all other issues of fact, the general rule becomes that this question is ordinarily for the jury."

In the course of the oral argument, a question was put to counsel from the bench in substance, as to what warning or caution the employer in this case could have given that would have been of any utility to the plaintiff?

With great deference we may be permitted to observe that the only complete answer to this question would have been, had the evidence not established the direct contrary, precisely what the amended answer of the defendant alleged in many forms (Paragraphs IV, V, VI, Tr. pp. 69-77) to-wit: that defendant warned and instructed and ordered the plaintiff *not* to go on said push-table at all.

That pleading is instinct with the consciousness that the only real defense of which this case could admit, was that the master did not expose this youth at all to the danger of mounting this push-table and especially not in the manner in which he was required to do when he was injured.

But this defense absolutely broke down and not the least under the testimony of the defendant's foreman himself. He testified (Tr., p. 192):

> "There would be *no occasion* for him to get up there *when it* (the mill) *was not running*. The only occasion there was for getting on that push-table *was when the mill was running*."

And see the succeeding testimony, Tr., pp. 193, 196, 201, referred to in former brief, pp. 15-16, 17-19.

We submit, in answer to the argument that this boy was expected to stop the mill whenever a jam occurred, that to prevent that self-same thing and to keep the continuous processes of the mill in motion and without interruption was the very object and purpose for which plaintiff was required repeatedly to expose his life and limb; moreover there is no evidence that any provision was made by which plaintiff could stop the rollers in the push-table; and the burden of such a defense rested on defendant.

Upon this particular branch of the case we beg to cite

what was said by the court in *Kuphal* vs. *Western Mountain Flouring Co.,* 43 Mont., 18, 114, Pac., 122, 125. It was there said, concerning a boy of 17, put to work at a rip-saw, that the work "was so dangerous that the boy ought not to have been allowed to use it at all."

This case by reason of the extraneous and as we submit latent risk caused by the master's negligence, and the other elements above referred to is vastly stronger for the plaintiff than that. For we submit that this case discloses a series of compulsory exposures of this youth to risks to the like of which no slave holder with any sense of the value of his human chattel would not have thought of exposing him.

But since this defense broke down, the defendant seeks refuge in confession and avoidance, which is predicated upon the premise that plaintiff was required to mount this push-table just as he attempted to do when he was hurt.

In that point of view, we respectfully submit that, especially in the case of an immature employee, who may, as is characteristic of youth, be thoughtless or inconsiderate of danger, especially when ordered to incur it, due warning still has its function. It is said under section 4055, volume 8 of Thompson Negligence (White's Supplement, 1914):

> "The reason for warning the servant is either to impart to him knowledge that he does not possess or to impress upon him the necessity of bearing in mind the danger."

In support of which it cites:

Belinczc vs. *Platt*, 84 Conn., 632, 81 Atl., 339;

Kuphal vs. *Western Mountain Flooring Co.*, 43 Mont., 18, 114 Pac., 122.

We invite particular attention to the case of *Petersen*

vs. *California C. Mills Co.*, 20 Cal. App., 751. In that case a petition for rehearing in the appellate court was denied by it, and a petition thereafter to have the case heard in the Supreme Court was denied by that court, and the case as the opinion shows was thoroughly considered.

We submit that that case is a strong authority against the contention that this case was improperly submitted to the jury. Much of what is there said has cogent application to the circumstances of this case. There, as here, a minor of 17 years of age was ordered to do a perilous task outside of his ordinary employment in a dangerous surrounding, without warning and under circumstances which established the master's negligence. See, *ibid*, pp. 756-760.

We submit that what is so much relied upon by defendant here in the cross-examination of the plaintiff six years after the injury, and after the plaintiff had fitted himself to describe the mill by a course of study in mechanical drawing, is well answered in the following extract from the opinion, *ibid*, pp. 756-757, to-wit:

> "The Socratic method of the examination was admirable and it revealed an intelligent and candid witness, but the conclusion that his answers required the withdrawal of the question of negligence from the jury is opposed to the principle enunciated in well-considered cases and is the result of a failure to give due prominence to certain significant features of the occasion. These circumstances, briefly stated, are the complexity of the situation, the fact that plaintiff was a minor and presumably without the judgment of an adult, that he was ordered by his superior to do the work which was outside of and more hazardous than his usual employment, that he was expected to and did obey promptly and that he had a right to assume that the ladder was placed with due regard

> for his safety. In view of these incidents we think it cannot be said as a matter of law that no other rational inference can be drawn than that plaintiff was guilty of contributory negligence."

And we submit that this case, as the court held in that (ibid, p. 760)

"Presents a case quite unusual in its cumulative effect in favor of respondents position."

Magone vs. *Portland Mfg. C.,* (Oregon), 93 Pac., 450.

See also *Pigeon* vs. *Fuller,* 156 Cal., 691, 697, where it is said, citing cases:

> "A servant is not precluded from recovery against a master who, without proper warning or instruction, puts him to work in a dangerous place by the fact that he may have some degree of comprehension of the danger. He will not be held to have consented to assume the risk unless there is a thorough comprehension on his part of the danger and the risk and a voluntary undertaking by him of that risk and danger."

It was further held in that case, *ibid*, p. 698:

> "Entire ignorance of the danger on the part of plaintiff was not therefore essential to a recovery. He was entitled to a verdict and judgment if he satisfied the jury that he had some degree of knowledge of the dangerous character of the employment, but did not understand or appreciate its full nature and extent."

Moreover, if the master had warned the boy of the particular danger which he encountered to his mutilation, who can say that he would not have refused to expose himself at all to this superadded work and its danger?

Since he was by the settled course of decisions in this state, entitled to this warning and instruction, can the master, having committed the breach of that duty, be now

heard to say, as a matter of law, that this youth even though so warned, would nevertheless have consented to expose himself as he was ordered to do? Since there concur here on part of the master both the sin of omission in failing to instruct and warn, and the sin of commission in ordering and requiring the exposure of the servant to the danger, extraordinary, both because outside of his regular work and because extraneous to any function of the mill, how can it be said that the case of the secondary assumption of risk is so clear and positive, that it became a matter of law, and left nothing to go to the jury?

We submit that the argument in support of such a conclusion harks back to what Lord Bramwell in adhering to the views expressed by him in *Dynen* vs. *Leach*, *supra*, is reported to have said in *Smith* vs. *Barker*, 60 L. J. Q. B. N. S., 683:

> "That a master is entitled to carry on his business in a dangerous way '*if the servant is foolish enough to agree to it!*'"
>
> Labatt, Master & Servant, p. 2583, note 2.

We submit that unless we have much mistaken the attitude of the Supreme Court of the United States and of the courts of last resort of California upon the question of what is due from a master, especially to a youthful servant, before such master can discharge himself from responsibility for injuries caused by his own negligence, on the ground of assumption by the servant of the risk as a matter of law, there has been accomplished a vast advance in these jurisdictions in the direction of closing the breach which the doctrine of assumed risk, as expounded by Lord Bramwell, created between the law and common morality; and that this case was properly submitted to the jury.

See Labatt, Master & Servant, section 960, *supra*, and notes.

As bearing upon the assignments of error in that there was not included in the instructions V, VI, VII and VIII, or any other instructions, a direction that is was incumbent upon the plaintiff to exercise ordinary care to discover dangers caused by the negligence of the defendant, we cite, in addition to *Texas & P. Ry. Co.* vs. *Archibald*, 170 U. S., 665, 671, and *Choctaw etc., Ry. Co.* vs. *McDade*, 191 U. S., 64, 67, the case of *Gila Valley G. N. R. Co.* vs. *Hall*, 232 U. S., 94 (U. S. Adv. Ops., 1913, p. 229, 231) *supra*, and cases therein cited. The court in the case last cited approved an instruction that,

> "The true test is not in the exercise of ordinary care to discover dangers by the employee, but whether the defect is *known* or plainly observable by him."

Respectfully submitted,

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